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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA Justice

PART 19

Index Number : 116044/2008
PROSKY, STEVE
vs
PETER SCALERA CONSTRUCTION
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

decided per the memorandum decision dated which disposes of motion sequence(s) no. 003, 004, and 005.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/8/13

Saliann Scarpulla J.S.C.
HON. SALIANN SCARPULLA

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

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STEVE PROSKY,

Plaintiff,

-against-

Index No. 116044/2008

PETER SCALERA CONSTRUCTION SERVICES, LLC, FINISHING TOUCHES, ANTHONY LoSCHIAVO, individually and d/b/a FINISHING TOUCHES and 455 HOSPITALITY, LLC, individually and d/b/a DOUBLETREE HOTEL TARRYTOWN, EAST COAST PRESERVATION and AVORE WALL COVERING SOLUTIONS,

Defendants.

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455 HOSPITALITY LLC, individually and d/b/a DOUBLETREE HOTEL TARRYTOWN,

TP Index No. 590940/2009

Third-Party Plaintiff,

-against-

EAST COAST PRESERVATION,

Third-Party Defendant.

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HON. SALIANN SCARPULLA, J.:

Motion sequence numbers 003, 004, and 005 are consolidated herein for purposes of disposition.

In sequence number 003, defendant Avore Wall Covering Solutions ("Avore") moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor, and dismissing the second amended verified complaint and all cross claims asserted against it.

In sequence number 004, defendants Finishing Touches and Anthony LoSchiavo ("LoSchiavo"), individually and d/b/a Finishing Touches ("Finishing Touches"), move for summary judgment in their favor and dismissal of all claims asserted against them. In sequence number 005, defendant Peter Scalera Construction Services, LLC ("Scalera Construction") moves for summary judgment in its favor and dismissal of all claims asserted against it. Third-party defendant East Coast Preservation ("East Coast") cross-moves for summary judgment in its favor and dismissal of all claims asserted against it.

In this action, plaintiff Steve Prosky ("Prosky"), a self-employed wallpaper installer, alleges that, on September 27, 2008, at 9 a.m., he sustained personal injury when he stepped off an empty five-gallon compound bucket onto painters' debris or other material on the floor at a construction project site. The project consisted, in relevant part, of the renovation of the Doubletree Hotel ballroom, located at 455 South Broadway in Tarrytown, New York. Prosky alleges that he stood on the bucket for approximately 45 seconds while showing the painters an area on the wall that needed to be patched, and that, when his feet touched an unidentified object on the floor, they slid out from underneath him, causing him to fall and sustain personal injury.

The accident occurred on a Saturday, when Prosky was not scheduled to work. Prosky testified that, when the accident occurred, he was with his then girlfriend, nonparty Nelsy C. Perez ("Perez").

Defendant/third-party plaintiff 455 Hospitality, LLC, individually and d/b/a Doubletree Hotel Tarrytown ("455 Hospitality"), the hotel lessee and operator and project owner, hired East Coast as the contractor for the project, pursuant to a letter agreement dated April 5, 2008. East Coast hired Scalera Construction as the project construction manager to coordinate the scheduling of the construction trades on the project, pursuant to a written letter agreement dated April 5, 2008. 455 Hospitality hired Finishing Touches, an interior finishes and painting subcontractor, pursuant to a written agreement. LoSchiavo is president and sole shareholder of Finishing Touches. Finishing Touches subcontracted the wallpaper portion of the job to Avore, a wallpaper consultant and designer subcontractor, pursuant to a one-page invoice dated September 16, 2008. Avore hired Prosky to hang wallpaper in the ballroom, pursuant to an oral agreement.

In the second amended complaint, Prosky asserts two causes of action for common-law negligence, violations of Labor Law §§ 200, 240 (1), and 241 (6), and negligent hiring.

In their respective answers, defendants deny all allegations of wrongdoing, and assert indemnification and contribution cross claims.

In the third-party complaint, 455 Hospitality asserts four causes of action for contractual and common-law indemnification and contribution. In the third-party answer, East Coast denies all allegations of wrongdoing, and asserts counterclaims and cross claims for contribution and indemnification.

Procedural Objections

Defendants and East Coast now move for summary judgment and dismissal of all claims asserted against them, on a variety of grounds.

In opposition, Prosky contends, as a threshold issue, that each of the defendants' motions is procedurally defective, on the grounds that they have each failed to annex all the pleadings, executed deposition transcripts, and properly certified reports and documents.

The court finds that Prosky's procedural objections to each of the motions are without merit. Prosky has mischaracterized, misinterpreted, and misrepresented defendants' exhibits and contentions, and has failed to cite a single example in support of his contentions. To the extent that any of the documents cited by the movants may deviate from the procedural requirements of a motion for summary relief, such deviation is de minimus. Moreover, and contrary to Prosky's conclusory contention, defendants have fully addressed Prosky's allegations in the bill of particulars regarding the existence of a dangerous and hazardous condition.

Labor Law § 240 (1) Claims

Section 240 (1) of the Labor Law imposes absolute liability upon owners and general contractors who breach their non-delegable duty to provide or erect safety devices necessary for the proper protection of a worker who sustains personal injury proximately caused by the breach. *Bland v. Manocherian*, 66 N.Y.2d 452, 459 (1985). The statute is

directed at "elevation-related hazards," which are defined as, "those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 514 (1991). Therefore, the special hazards encompassed by Labor Law § 240 (1) are limited to such gravity-related risks as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *See Ross v. Curtis-Palmer Hydro-Elec.*, 81 N.Y.2d 494, 500-501 (1993).

None of these circumstances exist here. Prosky testified at deposition that, as he stepped off the bucket, he stepped onto something on the ground that rolled, causing him to fall. Prosky does not allege that the bucket moved, or caused him to fall. Therefore, Prosky was not injured by an elevation-related risk. A worker injured while stepping down onto debris, or other hazard, may not invoke the protections afforded by Labor Law § 240 (1). *Nieves v. Five Boro A.C. & Refrig. Corp.*, 93 N.Y.2d 914, 915-916 (1999); *Sluchinski v. Corporate Prop. Invs.*, 258 A.D.2d 306, 306 (1st Dept 1999).

Accordingly, the branches of the motions for summary judgment on the Labor Law § 240 (1) claims in favor of movants are granted without opposition by Prosky, and these claims are dismissed.

Labor Law § 241 (6) Claims

Movants contend that summary judgment must be granted in their favor and the Labor Law § 241 (6) claims dismissed on the ground that Prosky has failed to specify an applicable Industrial Code section.

In opposition, Prosky contends that the debris near the bucket constituted a violation of Industrial Code § 23-1.7 (e) (12 NYCRR § 23-1.7 [e]).

To establish liability under Labor Law § 241 (6), the plaintiff must demonstrate that the defendant violated a specific Industrial Code section, and that such a violation was a proximate cause of the plaintiff's injuries. *See Romeo v. Property Owner [USA] LLC*, 61 A.D.3d 491, 492 (1st Dept 2009).

Section 23-1.7 (e) of the Industrial Code provides as follows:

> "(1) Passageways. All passageways shall be kept free from accumulations of direct and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed"

12 NYCRR § 23-1.7 [e]. *See also Lane v. Fratello Constr. Co.*, 61 A.D.3d 491, 576 (2d Dept 2008).

Here, the location of the accident, as alleged, falls squarely within the scope of Industrial Code § 23-1.7 (e) (2). Prosky alleges that he sustained personal injury as the result of a fall on debris that had accumulated on the hotel ballroom. While not a passageway as required by Industrial Code § 23-1.7 (e) (1), the location of Prosky's accident is, without any real dispute, a floor, or, area, where the project subcontractors were working.

Although Prosky was not able to describe the specific items that caused him to fall, other than to characterize them as "things around" the area where he fell, and most of the deponents testified that they did not see anything out of the ordinary on the floor in the area where the accident occurred, Perez attests that she witnessed Prosky slip and fall on rubbish or debris which consisted of empty paint cans, lids, sticks, poles, and trash. The debris as described by Perez is of the type that could be generated by painters, and falls within subsection (2) of the statute.

The alleged hazard upon which Prosky slipped and fell cannot, at this juncture, be found to be an integral part of the work being performed by him, rather than debris. *See Orlino v. 2 Gold, LLC*, 63 A.D.3d 541, 541 (1st Dept 2009); *Harvey v. Morse Diesel Intl.*, 299 A.D.2d 451, 452-453 (2d Dept 2002). There is no dispute that, when the accident occurred, Prosky had not yet set up his equipment and begun to hang wallpaper. Further, the only description of the alleged hazard in the record indicates that it consisted of debris left by painters.

Finishing Touches' painters were present at the project site and working in the ballroom when the accident occurred. Prosky testified that he stood on the bucket to instruct the Finishing Touches painters concerning the patching of a hole in the wall.

Contrary to movants' contentions, whether Prosky was, in fact, working at the time of the accident presents a triable issue sufficient to preclude summary judgment. In order to assert an actionable claim under Labor Law § 241 (6), a plaintiff must demonstrate that he or she sustained injury while "employed" or "lawfully frequenting" a construction project site. The record includes evidence that neither Avore wall paper hangers nor Prosky were scheduled to work on the date of the accident because they would have been in the painters' way, and that, when the accident occurred, Perez was present at the accident scene as Prosky's invited guest. However, there is also evidence that Prosky went to the ballroom with the intention of working, that the accident occurred as Prosky was completing his explanation to the Finishing Touches painters regarding some patching work before he could continue to hang the wallpaper, and that Prosky assumed he was working that Saturday.

In addition, whether the debris actually existed, was accurately described, or was created by Finishing Touches present triable issues sufficient to preclude summary judgment as to Finishing Touches liability on the Labor Law § 241 (6) claims. Therefore, the branches of the motion for summary judgment in Finishing Touches' favor on the Labor Law § 241 (6) claims are denied.

However, summary judgment dismissing those claims in favor of LoSchiavo, individually, is granted. While summary judgment is a drastic remedy, it is warranted where no genuine triable issues of material fact exist. *Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974); CPLR 3212. "[M]ere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgment. *Bonghi v. Firstcent Shopping Ctr.*, 116 A.D.2d 502, 504 (1st Dept 1986).

The mere fact that LoSchiavo is president of Finishing Touches is not a sufficient basis upon which to impose liability upon him individually. A corporation has a legal existence apart from that of its officers and shareholders; therefore, corporate officers, directors, or shareholders generally will not be held personally liable for the corporation's misconduct. *Port Chester Elec. Constr. Corp. v. Atlas*, 40 N.Y.2d 652, 656 (1976), unless the officers' "acts were taken outside the scope of their employment or . . . they personally profited from their acts." *Hoag v. Chancellor, Inc.*, 246 A.D.2d 224, 228 (1st Dept 1998) (internal citation and quotation marks omitted). The record is devoid of any evidence that LoSchiavo, personally created, or had knowledge of, the dangerous condition. There is no evidence that he was present at the project site on the date of the accident, nor is there any evidence that he received notice of the hazard from any person on the site, prior to the accident.

Further, Prosky has failed to allege any facts upon which the corporate form may be disregarded, and the corporate veil may be pierced, to reach LoSchiavo in his

individual capacity. *See Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 140-141 (1993).

In opposition to the motion by Scalera Construction, Prosky and 455 Hospitality contend that Scalera Construction is liable under the Labor Law in its capacity as the agent of East Coast, the project general contractor. "Although a construction manager of a work site is generally not responsible for injuries under Labor Law § 240 (1), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury." *Walls v. Turner Constr. Co.*, 4 N.Y.3d 861, 863-864 (2005); *Pino v. Irvington Union Free Sch. Dist.*, 43 A.D.3d 1130, 1131 (2d Dept 2007). "A party is deemed to be an agent of an owner or a general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured." *Linkowski v. City of New York*, 33 A.D.3d 971, 974-975 (2d Dept 2006).

To impose such liability, the defendant must have had authority to control the activity bringing about the injury, the method, and means used by the various contractors, so as to enable it to avoid or correct the unsafe condition. *See Walls,* 4 N.Y.3d at 864; *Linkowski,* 33 A.D.3d at 974-975. "It is not a defendant's title that is determinative, but the amount of control or supervision exercised." *Linkowski,* 33 AD3d at 975.

Here, the letter agreement between East Coast and Scalera Construction was drafted by Scalera Construction on Scalera Construction letterhead. In that contract,

Scalera Construction identifies itself as "Owner's Reps" and "Construction Manager," and describes Scalera Construction's responsibilities as:

> [including], but not limited to, scheduling of the project, buying any open contracts, **daily supervision of the project and sub[-] contractors**, material procurement, weekly monitoring and up-dating of the schedule, continuous budget review and value engineering to keep the project within the established budget and once the construction re-starts, conducting weekly project meetings with the sub-contractors to review any open items and to keep the project on schedule.

In addition, Scalera testified that he typically "made sure everybody was getting their stuff cleaned up and make sure the job was broom cleaned and ready for the next day."

Whether Scalera Construction had authority over the subcontractors sufficient to render it vicariously liable under the Labor Law as an agent of East Coast presents a triable issue of fact sufficient to preclude summary judgment in its favor. *See Harris v. Hueber-Breuer Constr. Co., Inc.*, 67 A.D.3d 1351, 1353 (4th Dept 2009).

For the foregoing reasons, the branches of the motion by Scalera Construction for summary judgment on the Labor Law § 241 (6) claims are denied.

With respect to Avore, Prosky contends that, whether or not Avore is the owner, general contractor, or an agent of either, it is required by the Labor Law to provide a safe place for Prosky to work, because it hired Prosky.

> As a general rule, a principal is not liable for the acts of an independent contractor because principals ordinarily do not

> control the manner in which independent contractors, as opposed to employees of the principal, perform their work. Control of the method and means by which work is to be performed, therefore, is a critical factor in determining whether a party is an independent contractor or an employee for the purposes of tort liability. While such determination typically involves a question of fact, in those instances where the evidence on the issue of control presents no conflict, the matter may properly be determined by the court as a matter of law. Moreover, the mere retention of general supervisory powers over an independent contractor cannot form a basis for the imposition of liability against the principal.

Goodwin v. Comcast Corp., 42 A.D.3d 322, 322-323 (1st Dept 2007) (internal citations omitted).

Here, the evidentiary record conclusively demonstrates that Avore was not the project owner, general contractor, nor an agent of either, and that it bore no contractual liability to maintain the area where the accident occurred. The record is devoid of any evidence that Avore had any direct employees present at the project site when the accident occurred.

Further, Prosky admits that, although hired by Avore, he was an independent contractor, provided his own tools and equipment, and that Avore did not supervise, manage, or control the manner, method, and means of his work. Therefore, Avore can bear no legal responsibility for Prosky's actions.

For these reasons, the branches of Avore's motion for summary judgment on the Labor Law § 241 (6) claims are granted in Avore's favor, and these claims are dismissed.

Labor Law § 200 and Common-Law Negligence Claims

Movants also contend that summary judgment must be granted in their favor on the Labor Law § 200 and common-law negligence claims and these claims must be dismissed because none of them supervised Prosky, and that none caused, or had knowledge of, the alleged hazardous condition.

In opposition, Prosky contends that the painters' debris upon which he slipped also constitutes a violation of Labor Law § 200 and common-law negligence by Finishing Touches, LoSchiavo, Scalera Construction, and East Coast because they each had actual or constructive notice of the hazard.

Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction workers with a reasonably safe place to work. *Ross,* 81 N.Y.2d at 505. "[W]here the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law." *Lombardi v. Stout*, 80 N.Y.2d 290, 295 (1992).

> Where . . . a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a general contractor may be liable in common-law negligence and under Labor Law § 200[,] if it has control over the work site and actual or constructive notice of the dangerous condition.

Keating v. Nanuet Bd. of Educ., 40 A.D.3d 706, 708 (2d Dept 2007).

Contrary to Prosky's contention, Prosky cannot demonstrate the existence of constructive notice by any of the movants. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 (1986); *Plantamura v. Penske Truck Leasing*, 246 A.D.2d 347, 347-348 (1st Dept 1998). The record is wholly devoid of any evidence that the alleged hazard existed for any length of time prior to the accident.

"To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom." *Solomon v. City of New York*, 66 N.Y.2d 1026, 1027 (1985). Each of these elements is essential; where the plaintiff fails to submit evidence legally sufficient to establish each and every element, summary judgment dismissing the claim is appropriate. *Febesh v. Elcejay Inn Corp.*, 157 A.D.2d 102, 104 (1st Dept 1990).

The branches of the motion by Avore for summary judgment on the Labor Law § 200 and common-law negligence claims are granted, and these claims are dismissed as asserted against this defendant. As discussed above, the evidentiary record conclusively demonstrates that Avore was not the project owner, general contractor, nor an agent of either, bore no contractual liability to maintain the area where the accident occurred, could not have caused, or had actual notice of, the alleged hazards, and, by Prosky's own admission, did not supervise, manage, or control the manner, method, and means of

Prosky's work. Therefore, Avore can bear no legal responsibility for Prosky's actions. *See Goodwin,* 42 A.D.3d at 322-323.

As discussed above, the record includes evidence that Finishing Touches painters were working in the area where, and when, the accident happened, and that the debris included empty paint cans and sticks of the type used by painters. Scalera testified that each trade, including the painters, was responsible for cleaning up the area where they were working, and that he observed Finishing Touches' painters or laborers cleaning up. Therefore, triable issues exist regarding whether Finishing Touches created the alleged hazardous condition.

However, nothing in the record raises a triable issue concerning LoSchiavo's individual liability under Labor Law § 200 or common-law negligence. Neither Prosky nor movants dispute LoSchiavo's deposition testimony that he was not personally present at the project site when the accident occurred. Thus, Prosky cannot demonstrate that LoSchiavo, individually, had actual knowledge of the alleged hazard.

Therefore, the branches of the motion for summary judgment on the Labor Law § 200 and common-law negligence claims in favor of Finishing Touches are denied. The branches of the motion for summary judgment on these claims in favor of LoSchiavo are granted, and these claims asserted against LoSchiavo are dismissed.

The branches of the motion for summary judgment in favor of Scalera Construction on the Labor Law § 200 and common-law negligence claims are denied.

Triable issues exist regarding whether Scalera Construction directed or controlled the subcontractors' work. Pursuant to the letter agreement between Scalera Construction and East Coast, Scalera Construction bore responsibility for the daily supervision of the project and the subcontractors. Triable issues also exist regarding whether Scalera Construction bore a duty to keep the ballroom floor clean of debris, and whether it had actual knowledge of the alleged hazardous condition. As discussed above, Scalera testified that he typically "made sure everybody was getting their stuff cleaned up and [made] sure the job was broom cleaned and ready for the next day."

Contrary to movants' contention, whether Prosky's conduct was the sole proximate cause of the accident presents an issue of fact reserved for trial. Where ladders were readily available, and yet the plaintiff chose to stand on an inverted bucket to reach the work area, and then jump down, the plaintiff is the sole proximate cause of the accident, and is not entitled to recover. *Montgomery v. Federal Express Corp.*, 4 N.Y.3d 805, 806 (2005). Whether the accident was caused solely by Prosky's conduct in standing on the bucket and then stepping down onto the floor, without using the scissor lifts, rolling scaffolds, and ladders available in the ballroom, constitutes a triable issue sufficient to preclude summary judgment in movants' favor.

Contribution and Indemnification Cross Claims

Each movant contends that the branch of its motion for summary judgment on its adversaries' cross claims should be granted, and those claims dismissed, for the same

reasons that summary judgment on Prosky's claims should be granted, and those claims dismissed.

The branches of the motions by Finishing Touches and Scalera Construction for summary judgment on the cross claims for common-law contribution are denied. Pursuant to CPLR 1401, "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them." The right to contribution arises when multiple wrongdoers owe a duty to the plaintiff or to the party seeking contribution and, by breaching that duty, they contributed to the plaintiff's personal injury. *Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.*, 71 N.Y.2d 599, 602-603 (1988). As held above, numerous triable issues exist regarding whether Finishing Touches and Scalera Construction were negligent or had actual notice of the alleged hazard.

However, the branches of the motions by Finishing Touches and Scalera Construction for summary judgment on the branches of the cross claims for common-law indemnification are granted.

> Implied indemnification has permitted a vicariously liable building owner and contractor to shift all liability to a subcontractor whose negligence actually caused the loss. However, a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine of indemnification. Thus, to be entitled to indemnification, the owner or contractor seeking indemnity must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought.

17 Vista Fee Assoc. v. Teachers Ins. & Annuity Assn. of Am., 259 A.D.2d 75, 80 (1st Dept 1999) (internal quotation marks and citations omitted); *Trump Vil. Section 3 v. New York State Hous. Fin. Agency*, 307 A.D.2d 891, 895 (1st Dept 2003). None of the contracts between the parties contain provisions indicating that any party has delegated exclusive responsibility for keeping the ballroom floor clean to another party.

The branches of the motions to dismiss the contractual indemnification cross claims are granted. The record conclusively demonstrates that none of the contracts between any of the parties contain contractual indemnification and hold harmless clauses.

The branches of the motions by Avore and LoSchiavo to dismiss all cross claims asserted against them are granted. As held above, the record conclusively demonstrates that neither of these defendants can be found liable, either in fact or in law, for the accident.

Third-Party Contribution and Indemnification Claims

East Coast cross-moves for summary judgment and dismissal of the branches of the third-party causes of action for common-law contribution and indemnification, contending that the record is devoid of evidence that it had exclusive control over the project site, or had actual or constructive knowledge of the alleged hazard.

In opposition, 455 Hospitality contends that because, as the project owner, it may be held vicariously liable under the Labor Law, it may be entitled to common-law contribution from East Coast, if Prosky demonstrates that East Coast was the general

contractor, or was negligent in failing to properly clean the ballroom floor and remove debris from the project site, and that such failure contributed to the accident.

"Where the liability of the owner or of the general contractor is only statutory, and is not predicated on a finding of negligence, the owner or general contractor is entitled to common-law indemnification by the subcontractor who negligence caused [the] employee's injuries." *Buccini v. 1568 Broadway Assoc.*, 250 A.D.2d 466, 468 (1st Dept 1998).

There is evidence that East Coast was hired by 455 Hospitality as the general contractor on the project, and that East Coast had authority over the entire project.

With regard to East Coast's alleged negligence, Scalera testified that East Coast had laborers present at the project site whose responsibilities included keeping the floor clean, taking junk out to the dumpsters, and cleaning the ballroom floor. Scalera further testified that he observed East Coast laborers picking "up scrap that would get dropped from the scaffolding or lifting, keep the floor clean, take the junk out to dumpsters . . . That is what they would [do] all day long. From the minute work started, there was garbage on the floor," including "construction byproducts and debris."

Similarly, Marcus Mizrachi, East Coast's director of operations, testified at his deposition that there were laborers on the job who were assigned to clean up construction debris and materials from time to time, and that, if he felt an area needed to be cleaned, he would request permission from East Coast to hire additional laborers. He also testified

that he did not know whether any East Coast employees were present at the project site at the time of Prosky's accident.

This evidence creates triable issues of fact regarding whether East Coast was the general contractor on the project, whether it bore responsibility for keeping the ballroom floor clean and free of debris, and whether it had actual knowledge of the alleged hazard sufficient to impose liability under the Labor Law and in common-law negligence. Resolution of these issues will determine whether 455 Hospitality has the right to seek common-law contribution from East Coast.

Therefore, the branches of East Coast's motion for summary judgment on the first, second, and third causes of action of the third-party complaint are denied.

Lastly, the branch of the motion for summary judgment on the fourth cause of action for contractual indemnification and dismissal of that claim is granted in East Coast's favor. 455 Hospitality concedes that its contract with 455 Hospitality does not include a hold harmless provision.

In accordance with the foregoing, it is

ORDERED that motion sequence number 003 for summary judgment in favor of defendant Avore Wall Covering Solutions is granted in its entirety, and all claims and cross claims asserted against it by any party are dismissed, with costs and disbursement to this defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that motion sequence number 004 for summary judgment in favor of defendants Finishing Touches and Anthony LoSchiavo is granted to the extent that summary judgment is granted in Finishing Touches' favor on the Labor Law § 240 (1) claim and the cross claims for contractual and common law indemnification, and in LoSchiavo's favor on all claims and cross claims asserted by any party against LoSchiavo, and those claims are dismissed; and it is further

ORDERED that the branches of the motion for summary judgment in favor of Finishing Touches on the claims for Labor Law §§ 241 (6) and 200 and common law negligence, and the cross claims for common law contribution are denied, and those claims shall continue; and it is further

ORDERED that motion sequence number 005 for summary judgment in favor of defendant Peter Scalera Construction Services, LLC is granted to the extent that summary judgment on the Labor Law § 240 (1) claim and the cross claims for contractual and common law indemnification is granted, and those claims are dismissed; and it is further

ORDERED that the branches of the motion for summary judgment in favor of Scalera Construction on the claims for Labor Law §§ 241 (6) and 200 and common law negligence and the cross claims for common law contribution are denied, and those claims shall continue; and it is further

ORDERED that the cross motion for summary judgment on the third-party action claims is granted to the extent that summary judgment in favor of third-party defendant

East Coast Preservation is granted on the fourth cause of action for contractual indemnification, and that claim is dismissed; and it is further

ORDERED that the remaining third-party action claims shall continue; and is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
April 8, 2013

ENTER:

Saliann Scarpulla, J.S.C.